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No. 79-890

In the Supreme Court of the United States

OCTOBER TERM, 1979

LAMERS DAIRY, INC., AND JEROME FISCHER
d/b/a UTSCHIG DAIRY, PETITIONERS

v.

SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the producer-settlement fund provided for by Section 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, 608c,[1] and the Federal Milk Order promulgated thereunder by the Secretary of Agriculture for the Chicago marketing area are unconstitutional.

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[1]Section 8c provides in relevant part (7 U.S.C. 608c):

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such

1. This is an action under Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), to review the Secretary of Agriculture's dismissal of a petition challenging the

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orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject * * * only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, * * * and (f) a further adjustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. * * *

validity of Federal Milk Order No. 30.[2] That Order, among other things, establishes a producer-settlement fund under which producers delivering milk to handlers within the Chicago marketing area receive uniform prices for their milk.

Petitioners are handlers or distributors of milk who complain that the pooling arrangement of the producer-settlement fund, in which their participation is obligatory under the Order, results in the taking of their property without just compensation in violation of the Fifth Amendment. The district court, both initially (Pet. App. 7-15) and on reconsideration (*id.* at 5-6), rejected this argument and granted summary judgment for the government, noting that the same contention was considered and rejected by this Court in *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533 (1939). The court of appeals, after identifying this broad constitutional challenge as the "sole issue on appeal" (Pet. App. 1),[3] affirmed the district court's ruling. In doing so, the court of appeals stated that "[t]he constitutionality of the producer-settlement fund provided for by Congress in Section 8c(5) of the Act was expressly approved by the Court in *Rock Royal*" (Pet. App. 2). The court also rejected petitioners' plea that it "decline to follow the decision in *Rock Royal* on the ground that its vitality has been eroded by economic changes in the dairy industry during the forty years since the Supreme Court decided that case" (Pet. App. 3). The court observed that it regarded the "arguments in this context to be properly addressed to the Congress, not the federal courts" (*ibid.*).

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[2]Judicial review is available to determine whether the disputed administrative ruling is "in accordance with law." See, *e.g.*, *Lewes Dairy, Inc.* v. *Freeman*, 401 F. 2d 308 (3d Cir. 1968), cert. denied, 394 U.S. 929 (1969).

[3]Several additional claims were made and rejected in the district court but were not pursued on appeal (Pet. App. 10-15).

2. The court of appeals correctly concluded that petitioners' claims are foreclosed by this Court's decision in *Rock Royal*. The ruling below does not conflict with any decision of the other courts of appeals. Further review of the decision in this case is therefore unwarranted.

Petitioners acknowledge (Pet. 23-25) that their precise claim was considered and rejected by the Court in *Rock Royal*. They contend, however (Pet. 25-27), that "changed circumstances" have rendered the *Rock Royal* decision obsolete and that the matter should therefore be reviewed anew. Quite apart from the fact that the putative "changed circumstances" upon which petitioners rely are presented as facts without record or other citation (see Pet. 25-27; Pet. App. 23),[4] it is apparent that the decision in *Rock Royal* did not turn upon the presence or absence of particularized market conditions. Rather, the Court addressed Congress' power to legislate under the Commerce Clause and set forth general principles that undeniably remain as valid now as when *Rock Royal* was decided. Thus, in terms that accurately describe petitioners' challenge here, the Court in *Rock Royal* characterized the contentions made in that case as follows (307 U.S. at 571-572):

> The defendants' objection * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their

[4]In any event, the factors petitioners mention in this connection more appropriately bear on the issue whether there is substantial evidence to support the Order. The district court found substantial evidence to support the one aspect of the Order that was challenged (Pet. App. 15), and petitioners have since abandoned their challenge to the Order on substantial evidence grounds.

> patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. This argument assumes the validity of price regulation, as such, but denies the constitutionality of the pooling arrangement because handlers are not at liberty to pay the producer in accordance with the use of the producer's milk but must distribute the surplus to others whose milk was resold less advantageously. It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid; and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.

The Court then upheld the producer-settlement fund on grounds that compel the same result today (307 U.S. at 572-573):

> No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In *Mulford* v. *Smith*, [307 U.S. 38 (1939)] we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the

movement on terms of pool settlement here provided.

> Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

It can still be said that "[c]ommon funds for equalizing risks are not unknown," and it is simply too late in the evolution of Congress' power to legislate in the area of interstate commerce to gainsay the Act's validity. Thus, the court of appeals was plainly correct in admonishing petitioners to seek congressional relief if they wish to eliminate this manner of regulation in the dairy industry on the basis of changed circumstances. See *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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